No. 11814

In the United States Circuit Court of Appeals for the Ninth Circuit

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T. J. BRANDON, JR., with alias THOMAS JEFFERSON, WILL KEY JEFFERSON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

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JURISDICTIONAL STATEMENT

The original appeal in this matter was remanded by the United States Circuit Court of Appeals for the Ninth Circuit for consideration of Appellant's motion for a new trial upon the ground of after discovered evidence. The order contains the following:

> While we retain jurisdiction of the appeal from the sentence, we order the cause remanded for the consideration by the District Court of these claims.

STATEMENT OF FACTS

On January 8, 1947 the jury returned a verdict finding Will Key Jefferson guilty of the crimes of forgery and uttering and publishing a forged check. On March 7, 1947 defendant filed a motion for new trial

upon the ground of newly discovered evidence, the newly discovered evidence being a copy of a purported lease between Jefferson and one Wosdon P. Lang which came into his hands subsequent to his trial. This motion was denied by the trial court in a written opinion.

Upon the hearing of defendant's motion for new trial, he introduced a copy of this purported lease as his Exhibit BB (R.15). Jefferson testified that this copy was a triplicate copy of a lease allegedly executed between himself and Wosdon P. Lang (R.33).

At the hearing Jefferson testified that he had no knowledge or recollection that this third copy of the lease had been made or was ever in existence (R.33). He further stated that until the lease (referring to Exhibit BB) was turned over to him by Elizabeth Dolan, he had never seen the lease; that he had never had the slightest knowledge of the lease; that he didn't even have any reason to believe that such a copy of the lease existed (R.47). At the same hearing Jefferson testified that of his own positive knowledge Lease BB was a genuine document which was executed on the 10th day of February, 1945 (R.51). According to Jefferson's own testimony he was personally present when Exhibit BB was executed and his signature appears thereon.

The copy of lease Exhibit BB, according to Jefferson, came to light unexpectedly, subsequent to his trial, in the hands of Mrs. Dolan, who had a lease on the

Deeleventh Apartments (R.33-34). According to Jefferson, the papers in which Mrs. Dolan found the lease had no connection with the bills or leases or other things concerning the apartment house. They were simply papers of transactions between Mrs. Dolan and Jefferson (R.48-49).

Mrs. Dolan testified that she found the lease BB among pictures and personal papers while searching for one of her withholding tax slips, preparatory to preparing her income tax return (R. 103, 134). Mrs. Dolan did not know how the particular slip got in that box (R.137).

Dolan allegedly had an existing lease on the Deeleventh Apartments on February 10, 1945. (R. 84, 93, 94). It was a lease from Emma R. Maresh to Mrs. Dolan through Jefferson under a power of attorney from Emma R. Maresh (R.93). Mrs. Dolan was subpoenaed duces tecum to produce her copy of such lease but was unable to produce any such lease (R.101-102). The subpoena also ordered her to produce copies of all leases in her possession which were executed subsequent to the date the Deeleventh Apartments were leased to her. No leases or copies of leases were produced by her (R.101-102).

Mrs. Dolan testified that Jefferson never turned over copies of other leases to her and that if he had turned Exhibit BB over to her, it would be the only copy of a lease he had ever given her (R.136). Other testimony also disclosed that Dolan never had copies

of any of the other leases for the apartment house (R. 43, 122).

Prior to the return of the indictment herein on October 6, 1946, the Deeleventh Apartments and Jefferson were involved in a foreclosure proceeding. This action was tried in July and August of 1946. There were over 1,000 exhibits introduced in the lien action (R.131). Mrs. Dolan in her affidavit states that she put this lease (Exhibit BB) away at the time of the trial of the foreclosure proceeding.

Jefferson had never contacted Mrs. Dolan to find if she had a copy of the lease in her possession (R.43, 82).

ARGUMENT

While the Appellant in his statement of points relied upon in his brief does not set forth each point under a separate heading, it is felt for the purpose of clarity and for the convenience of the Court, that it would be well for this brief to contain such a categorical arrangement.

FIRST POINT: 1. THE EVIDENCE IS NOT NEWLY DISCOVERED EVIDENCE.

In support of this point Appellee hereby incorporates as part of this brief and adopts by reference the trial court's opinion rendered at the conclusion of the hearing on the motion for new trial on the ground of newly discovered evidence, which has been designated as part of the record on this appeal.

SECOND POINT: 2. FORGOTTEN EVIDENCE IS NOT NEWLY DISCOVERED EVIDENCE.

Notwithstanding Jefferson's declarations to the contrary, the conclusion is inescapable that Jefferson had knowledge of the existence of the triplicate copy of the Lease BB. His signature appears thereon and according to his testimony he was personally present when the lease was executed. His testimony further reflects that he personally turned this copy of the lease over to Mrs. Dolan.

Forgetfulness or oversight of evidence or witnesses by applicant until after the trial is not ground for a new trial.

46 **C.J.,** Sec. 230, p. 259 and cases cited in footnote thereunder.

Were the rule otherwise and a new trial were to be granted on the basis of matters purportedly forgotten, it would place a premium on fraud and perjury and serve to defeat rather than to promote the ends of justice.

THIRD POINT: 3. DUE DILIGENCE ON THE PART OF APPELLANT TO OBTAIN EVIDENCE IN QUESTION PRIOR TO OR DURING THE TRIAL OF THE CASE WAS NOT EXERCISED.

Jefferson and Mrs. Dolan both testified that Jefferson had never contacted Mrs. Dolan to see if she had a copy of the lease in her possession. There is no

showing by the testimony of any witness or by affidavit that Jefferson made any effort to locate the triplicate copy of the lease Exhibit BB prior to trial. The complete absence of any such effort on his part would lead one to believe that he did not want this copy of the lease discovered until after trial.

No matter how material the testimony may have been, an applicant for a new trial on the ground of newly discovered evidence must have used ordinary diligence to discover and produce the evidence at trial.

46 **C.J.,** Sec. 222, p. 249 and cases there cited.

In **U.S.** v. **Johnson,** 142 F.2d, p. 588, the Court, on page 592, quotes **Berry** v. **State of Georgia,** 10 Ga. 511:

> Upon the following points there seems to be a pretty general concurrence of authority, viz.: that it is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2nd. That it was not owing to the want of due diligence that it did not come sooner. 3rd. That it is so material that it would probably produce a different verdict, if the new trial was granted. 4th. That it is not cumulative only—viz.: speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of

the testimony is to impeach the character or credit of a witness.

In **Wagner v. U.S.,** 118 F.2d, 801, the United States Circuit Court of Appeals for the Ninth Circuit, at page 802, in ruling upon this question, uses the following language:

> We do not regard them as meeting the requirements, and particularly requirement (e) of Johnson v. United States, 8 Cir., 32 F.2d 127, 130. We quote from the opinion: "There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." See also Isgrig v. United States, 4 Cir., 109F.2d131,194.

Particular attention is invited to subdivisions (a) and (b) above. In the instant case the Appellant has neglected and failed to show that the evidence was, in fact, newly discovered or that there was nothing in the hearing from which the Court could infer diligence on the part of Appellant.

FOURTH POINT: 4. THE GRANTING OF A NEW TRIAL RESTS IN THE SOUND DISCRETION OF THE COURT.

The action of the Court in refusing to grant a new trial on the basis of newly discovered evidence should be viewed in the light of whether or not there is a plain abuse of discretion. Unless such abuse is manifest, the ruling of the trial court should not be disturbed.

> In **U.S.** v. **Johnson,** 142 F. 588 at page 591:
> After such a review and consideration we do not have the right, where there are no improper exclusions, to substitute our findings of judgment for that of the trial court. We determine by the record only whether the trial judge might reasonably have reached the conclusion which he did.

In **Long** v. **U. S.,** 139 F.2d, 652, we find on page 654 the following expression by the Court:

> It is well settled that the matter of granting a new trial on after discovered evidence rests in the sound judicial discretion of the trial court, and an order refusing a new trial on that ground will not be disturbed on appeal in the absence of a plain abuse of discretion. Wulfsohn v. Russian-Asiatic Bank, 9th Cir., 11 F.2d, 715. And it is equally well settled that an application for new trial based upon that ground is not regarded with favor and will be granted with great caution.

An examination of the record on this hearing reveals that the trial court was fully justified in refusing to grant a new trial, and such refusal, in view of all the facts, was not an abuse of discretion.

CONCLUSION

I

Jefferson's guilt was passed upon by the trial jury.

II

The motion for new trial on the ground of newly discovered evidence was considered by the trial judge, who was familiar with the entire record and who was personally present and observed the witnesses as they testified.

III

The verdict of the jury and the ruling of the trial judge should not now be disturbed.

Dated, Anchorage, Alaska, February 8, 1950.

Respectfully submitted,

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